United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

766

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23614

UNITED STATES OF AMERICA

v.

MARVIN E. HARRINGTON,

Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

David Rein
711 14th St., N. W.
Washington, D. C. 20005
Attorney for Appellant
(Appointed by the
Court)

TABLE OF CONTENTS

CASES CITED

Miscellaneous

---

*Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23614

UNITED STATES OF AMERICA

v.

MARVIN E. HARRINGTON

Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

ISSUES PRESENTED FOR REVIEW

1. Whether it was error, to deny without hearing or inquiry, defendant's request that his court appointed lawyer be discharged because defendant had no confidence in him.

2. Whether under these circumstances the defendant was denied the effective assistance of counsel.

3. Whether it was error to deny, without hearing, defendant's request for the minutes of the grand jury proceedings.

4. Whether the trial court's expressed and unjustified hostility towards the defendant deprived him of a fair trial.

This case has not been previously before the Court.
References to Rulings - None

STATEMENT OF THE CASE

Appellant was convicted after a trial by jury, of second degree burglary, grand larceny, and unauthorized use of a vehicle. He was sentenced to concurrent terms of two to six years on the burglary and grand larceny counts, and one to three years on the unauthorized use of a vehicle to run consecutively to the sentences on the other counts.

The evidence at the trial

The government presented three witnesses. Police officer Finck testified that at approximately 5:00 a.m. on October 19, 1968 he received a call that there had been a breaking in at a carry out shop at McCullough Street. When he approached the area he observed that the windows of the shop had been smashed and that a safe was lying in the alley outside the shop. Private Finck heard an unidentified voice behind him say "they are still inside." He looked inside, saw a Negro male and ordered him out. He identified the "Negro male" as the defendant. He searched the defendant, and found a set of keys belonging to an automobile which was parked in the alley. (Tr. I 5-27).[1/] The owner of the carry out shop identified the safe as

---

1/ There are two transcripts of the trial proceedings separately paginated. The first contains the testimony and the second contains the closing arguments and instructions to the jury. We employ the notation Tr. I for the transcript of the testimony and Tr. II for the transcript of the closing arguments and jury instructions.

belonging to the carry out shop and stated that it had approximately $300 in it. (Tr. I 35-41). A representative of Avis-Rent-A-Car identified the car which was in the alley as belonging to that company and testified that it was not out on rental at that particular time. (Tr. I 41-50).

The sole witness for the defense was the defendant. He denied breaking into the carryout shop, and he denied that the keys to the car were in his pocket at the time of his arrest. He testified that he was arrested by officer Finck a couple of blocks from the carry out shop while walking home. (Tr. I 54-60).

Pre-trial events

Appellant was indicted on December 11 and was arraigned and pleaded not guilty on January 10. His efforts to retain counsel proved unsuccessful and accordingly on April 2 counsel was appointed by the court. On May 23, defendant wrote to the court as follows:

> Dear Sir
>
> My name is Marvin E. Harrington and I have been appointed a counsel that I don't have any confidence in what so ever, it would be grately (sic) appreciated if this honorable Court would grant me a different attorney to my cause. if possible I would prefer Miss Jean F. Dwyer or Mr. William J. Garber.

No hearing or inquiry was held on this request. It bears the notation "Denied Curran J."

Earlier on April 24, defendant had filed pro se a motion for a copy of the transcript of the minutes of the grand jury. He recited in the motion that it was based on the decisions in this Court in Allen v. United States, 129 U.S. App. D.C. 61, 390 F. 2d 476 (1968) and Gaither v. United States, U.S. App. D.C. , 413 F. 2d 1061 (1969). The motion was not set down for hearing or argument. It too simply bears the notation "Denied, Curran, J."

Events at the Trial

At the conclusion of the cross-examination of Officer Finck, the defendant apparently attempted to communicate with the court. The transcript (Tr. I, 24) shows the following:

> "MR. KEREN: May I have Your Honor's indulgence for a second.
>
> THE COURT: You say what you have to say to your counsel.
>
> THE DEFENDANT: Your Honor . . .
>
> THE COURT: Say what you have to say, you whisper it to your lawyer.
>
> Do you have any further questions, Counsel?
>
> MR. KEREN: That is all, if the Court please."

At the close of the court day, the court addressed defendant's counsel as follows (Tr. I, 27-8):

> "Mr. Keren, tomorrow morning you remind me before

> I bring the jury in, I want to speak to that defendant, because I am not going to have any foolishness out of him or any other defendant in this court. So you remind me that I am to address him about his conduct in this court before the jury comes in."

At the opening of court on the next day, Mr. Keren reminded the court that he wanted to speak to the defendant. The court then addressed the defendant as follows (Tr. I, 31-2):

> "Let me say to you, Mr. Harrington, that you heard me tell this jury when this case started that I am responsible for the trial of this case and how this case is conducted in the court room. Now, in that connection, I am responsible for the conduct of everybody, including your own, and I don't intend to have any interruptions. You will address the Court through your counsel, and your counsel has relayed and will relay everything that he thinks is pertinent in connection with your discussion.
>
> He is an experienced attorney. He has an obligation to you and to this Court to try this case with the protection of every interest that the law gives you. It is the Court's responsibility to see that it is done, and it will be done.
>
> You will not interrupt this Court at any time, and if you do, I will take such appropriate action as is necessary."

The defendant responded that he had "one thing" to say to the court. After being granted permission to address the court, the defendant stated: "I have no confidence in my lawyer whatsoever." He listed the following as his reasons: (1) counsel had told him that if he did not plead guilty to grand larceny, the court would give a maximum sentence on all counts; (2) his counsel had given defendant's copy of the transcript of his preliminary hearing to the government counsel; and (3) while defendant was in jail prior

to trial (defendant had been incarcerated since his arrest on December 19) counsel "only came to see me about twice." The court retorted: "What is he supposed to do -- spend his nights with you?" (Tr. I, 32-3).

The court then asked for and received counsel's version of the conversation about the plea, namely that he had advised defendant of the maximum penalties for each count, and that he had an opportunity of pleading to the grand larceny count alone, but that he did not advise that the court would give a maximum sentence on all counts. Mr. Keren also acknowledged that he had shown a copy of the transcript of his preliminary hearing to government counsel and added: "this transcript was paid for by the Government." (Tr. I, 33-34). The court then inquired whether defendant had anything else to say and the following transpired (Tr. I, 34-5):

> "THE DEFENDANT: Only that I want the Court to give me another lawyer.
>
> THE COURT: Yes, I know. That request is denied. We are going to continue this trial.
>
> THE DEFENDANT: I want another lawyer.
>
> THE COURT: Now, Mr. Harrington, if I have any further difficulty out of you, let me tell you what I am prepared to do. You are going to be tried in this case. As soon as I bring the jury in, the trial is going to continue. You have the alternative of sitting there and behaving yourself or I will put you in leg irons and a gag.

Do you understand that?"

The defendant made no response and defense counsel made no remonstrations at the court's remarks to the defendant.

ARGUMENT

I. The Trial Court Erred in Denying, without hearing or inquiry, defendant's request that his court appointed lawyer be discharged because defendant had no confidence in him. Under the circumstances, defendant was denied the effective assistance of counsel.

In Lee v. United States, 235 F. 2d 219, 98 U.S. App. D.C. 272 (1956), this Court held that a trial court should not appoint as counsel for a defendant an attorney whom the defendant finds objectionable. See also Duke v. United States, 255 F. 2d 721 (9th Cir. 1958) cert. den. 357 U.S. 720. Of course, the right of an indigent to have counsel appointed for him does not give him the right to be represented by a lawyer of his own choice. United States v. Burkeen, 355 F. 2d 241 (6th Cir. 1966). However, where a defendant objects to an assigned counsel and requests new and different counsel, it is error to reject that request out of hand without any hearing or inquiry. That rule was laid down for this Circuit in Brown v. United States, 105 U.S. App. D.C. 77, 264 F. 2d 363 (1959) cert den. 360 U.S. 911. That case was decided by an

en banc court with an opinion written for four judges by Judge Wilbur Miller, and a dissenting opinion written for four judges by Judge Washington. Judge Burger, who cast the controlling vote, stated in a concurring opinion (App. D.C. at 83 , F. 2d at 369) that he saw "common agreement" in Judge Miller's opinion and in Judge Washington's dissent on the following proposition:

> "...when, for the first time, an accused makes known to the court in some way that he has a complaint about his counsel, the court must rule on the matter. If the reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known. Limited only by the necessity to ascertain the basis of the objection and then to rule on the reasons rather than on a naked request for new counsel, the trial court must be allowed very wide discretion."

See also Smith v. United States, 122 U.S. App. D.C. 300, 353 F. 2d 838.[2/] (1965).

Counsel was appointed for defendant on April 2. On May 23, defendant informed the court that he had no "confidence...whatsoever" in his appointed counsel and requested the appointment of a different attorney specifically naming two preferences. All that the court had before it at the time of this request was the appointment of counsel, the request and the fact that the defendant had earlier filed a pro se

---

2/ In the Smith case, the Court expressly disapproved of the view of the trial court, that once counsel is appointed for an indigent "that is it." (App. D.C. at 307 , F. 2d at 845, fn. 17).

motion for a copy of the transcript of the grand jury minutes.[3/] The court made no inquiry as to the reasons for defendant's dissatisfaction with his trial counsel, or as to whether either of defendant's stated preferences as defense counsel were willing to accept the appointment. The request was not a last minute maneuver, consideration of which would have disrupted the trial and upset the court's calendar.[4/] The request here was made on May 23, and defendant did not go to trial until Aug. 5.[5/] There was ample time to consider defendant's request, inquire into the reason for the request, and ascertain whether other counsel satisfactory to the defendant could be appointed. The failure to give the request such consideration was clearly error under this Court's ruling in Brown, supra.

3/ As we show below, it was error to deny this motion without a hearing.

4/ Although consideration of the court calendar is a factor to be weighed in determining whether or not to grant a request to discharge appointed counsel and appoint new counsel, it is not in and of itself reason to deny such a request when it is supported by strong and justifiable grounds. Even where the request is late it must at a minimum be entertained and considered, cf. Smith v. United States, supra. A fortiori it must be considered where there is ample time to do so without delaying the trial.

5/ The delay in trial stemmed largely from the delay in obtaining a copy of the transcript of defendant's preliminary hearing. Although defendant's counsel was appointed on April 2, he did not make the request for the transcript until May 22. The record does not disclose the reason for the delay in securing the transcript, at most a few pages, after the request was made.

The error was prejudicial. As the court stated in Lee v. United States, supra (App. D.C. at 274, F. 2d at 221, fn. 5):[6/]

> "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously."

The appointment of counsel who does not meet these requirements and in fact under circumstances which negate the existence of the appropriate attorney-client relationship as defined in Lee is per se error. Cf. Powell v. Alabama, 287 U.S. 45 (1932), Glasser v. United States, 315 U.S. 60 (1942), Lee v. United States, supra.

Moreover, appointment of counsel under such circumstances, and the insistence that such a relationship continue despite mutual dissatisfaction and distrust is inconsistent with the requirement that appointed counsel be effective counsel. Cf. Ellis v. United States, 356 U.S. 674 (1958). The "first essential ingredient of the right to counsel" is "a devotion to the interest of the accused that was at least equal to that expected from compensated counsel of an accused's own choosing." Johnson v. United States, 328 F. 2d 605, 606 (5th Cir. 1964).[7/] The record here shows that appellant, while he

---

6/ The Court was quoting from the second circuit decision in In re Mandell, 69 F. 2d 830, 831 (1934).

7/ "Requiring the defendant to continue with a lawyer with whom he constantly disagrees is unlikely to encourage devoted representation by counsel or an orderly trial" (Note) Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1446 (1965).

had appointed counsel, filed a pro se motion for production of the minutes of the grand jury which was at least prima facie meritorious, and that his appointed counsel did nothing to see that the motion was brought to hearing or to pursue it with the court. Although the factual issues were admittedly simple, the record shows no more than a perfunctory performance on the part of defense counsel. And the rather strange occurrence of a mysterious voice who informed the officer of defendant's presence remained unexplained and unexplored. Whether this failure was due to the lack of the necessary "faith and confidence" that should exist in an attorney-client relationship, or to other factors, does not appear. Finally, when the trial court behaved outrageously and unjustifiably to the defendant, infra, p. 12, his counsel did not remonstrate with the court or take any steps to protect the defendant.[8/] On the contrary, counsel made it clear that he was not in harmony with the defendant and the defendant's actions (Tr. I 21, 52-3).

II. The Trial Court's Unjustified Expression of Hostility Toward the Defendant Deprived Him of a Fair Trial

When defendant came to trial on August 5, he was represented by

---

8/ Counsel's failure to speak up for the defendant may have stemmed from his unwillingness to be rebuked by the court, who seemed to be unnecessarily sharp to counsel on another occasion (Tr. I, 52). But this would not alter the fact that defendant did not receive the representation to which he was entitled.

counsel in whom he had no trust or confidence. His request that this appointed counsel be discharged had been denied without any inquiry or hearing. Indeed it does not appear from the record that the denial had even been communicated to the defendant. In this setting, defendant made an effort to communicate with the court directly. He said, "Your Honor," but thereupon desisted as soon as told to by the court. Without hearing what the defendant wished to say, the court stated: "I am not going to have any foolishness out of him or any other defendant in this court." When the defendant was later granted permission to speak to the court, he explained his dissatisfaction with counsel and gave his reasons. His statement that counsel "only came to see me about twice" was met with the court's derision and sarcasm.[9/] His continued insistence that he wished another lawyer, made at a time when the jury was out, and defendant had been granted permission to address the court, was met with the savage threat that he would be put in "leg irons and a gag." Obviously nothing in the defendant's conduct called for such a rebuke or for such a threat. This unjustified outburst requires reversal.

This Court addressed itself to a similar problem in Whitaker v. McLean, 73 U.S. App. D.C. 259, 118 F. 2d 596 (1941) where the Court reversed a judgment in

---

9/ The court said: "What is he supposed to do - spend his nights with you?" (Tr. I, 33).

a civil case because of uncomplimentary remarks made by the trial court concerning the plaintiff[10] in a colloquy with counsel out of the presence of the jury. The Court found it necessary to reverse even though it did not consider plaintiff's claim to have merit. The Court said (App. D.C. at 259, F. 2d at 596):

> "The judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view, he was subjectively free from bias. But bias must be considered objectively. Few, if any, judges would make the reported remarks, in the course of a trial, unless they had developed definite and positive hostility to plaintiff and his case. . . . A right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him."

A fortiori, the conduct of the trial court, in the present case, which is a criminal rather than a civil case, requires reversal.[11] At a minimum, even if guilt be clear, a defendant is entitled to be sentenced by an impartial and unbiased judge.

Moreover, where there is a biased or hostile judge, a reversal is required even in the absence of any showing of prejudice. "Even if no prejudice to the defendant were apparent, the interests of public justice require a trial conducted by one who is a disinterested and objective participant in the proceeding" Young v. United

---

10/ The opinion does not set out the text of the uncomplimentary remarks.

11/ Although defense counsel did not move for a new trial, under the circumstances, his failure to do so cannot be charged against the defendant.

States, 120 U.S. App. D.C., 312, 315, 346 F. 2d 793, 796. A trial judge must not only be impartial but he must appear impartial as well, Berger v. United States, 255 U.S. 22 (1921). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice," Re Murchison, 349 U.S. 133, 136 (1955). See also Offutt v. United States, 348 U.S. 11, 14 (1954); Rapp v. Van Dusen, 350 F. 2d 806, 812 (3rd Cir., 1965).

III. It was error to deny, without hearing, defendant's request for the minutes of the grand jury proceeding.

Defendant, although represented by appointed counsel at the time, filed pro se a motion for a copy of the transcript of the minutes of the grand jury. In his motion, he recited that he was relying on the decisions in this Court in Allen v. United States, 129 U.S. App. D.C. 61, 390 F. 2d 476 (1968) and Gaither v. United States, U.S. App. D. C. , 413 F. 2d 1061 (1969). No response was filed to the motion and no steps were taken either by counsel, the clerk or the court to set the motion down for hearing. Without any inquiry, it was denied by the court, apparently in chambers. The record contains no evidence that the denial was communicated to the defendant.

Although it is clear that the defendant was not entitled to the relief requested on the basis of the opinion on the petition for rehearing in Gaither, App. D.C. at , F. 2d at 1081-5,[12] it is equally clear that defendant was entitled to the relief requested under this Court's decision in Allen, unless the government had some valid objection to release of those minutes. At a minimum, the defendant was entitled under Allen to an inquiry as to the nature of his need for the minutes and the objections, if any, that the government may have had to releasing the minutes. The denial of the request without any inquiry was clearly error.[13]

CONCLUSION

The increase in criminal offenses and in the number of indigent defendants, and new appellate decisions granting protective procedures to such defendants have put a serious strain on court calendars. It is perhaps understandable that in the light of our

---

12/ The motion was filed prior to the decision on the petition for rehearing. It was apparently denied after that date.

13/ Concededly, in Allen this Court did "not hold that the production of a witness' grand jury testimony should be compelled in every case upon a mere request" App. D.C. at 66, F. 2d at 481. It is also true that defendant's pro se motion did not specify the testimony of any particular witness. But obviously these matters could have been clarified and sharpened if the motion had been set for hearing and counsel had assisted defendant in its presentation.

crowded courts and the congestion of the court calendars, many trial judges feel harassed and irritable, and reflect that irritability by exhibiting impatience and resentment at the many procedural problems that continually arise in what appears to them to be simple criminal cases. Defendants nonetheless are entitled to a fair trial and to the procedural protections laid down for them in appellate decisions in fact as well as in form. The present appellant is clearly a victim of the impatience of the trial courts and the bar. The defendant was incarcerated from the time of his arrest. His appointed counsel had no time to discuss with the defendant his ideas of how the case should be tried and what motions should be filed. He accordingly, executed his pro forma right to file motions by himself but they were ignored by his counsel and impatiently denied by the trial court without a hearing. His request prior to trial that his appointed trial counsel be changed was summarily denied. His renewal of that request at trial was greeted with a savage and unjustified outburst by the court. Defendant's trial was neither just nor did it have the appearance of justice. The judgment below should be reversed with directions to grant defendant a new trial.

Respectfully submitted,

David Rein
711 14th St., N. W.
Washington, D. C. 20005
Attorney for Appellant
(Appointed by the Court)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appellate No. 23611

UNITED STATES OF AMERICA

v.

MARVIN E. HARRINGTON, JR., Appellant

Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Appellant petitions for a rehearing of the decision dated November 4, 1970, affirming appellant's conviction. Appellant also suggests the appropriateness of a rehearing in banc.

We submit that the decision establishes a precedent which will be injurious to indigent defendants generally, and which departs from the principles previously laid down by this Court.

In affirming the judgment below the Court stated (slip opinion, p. 1): "A rule that required an evidentiary hearing for every request for new counsel . . . would open the door to disruption of any reasonable calendar system." But the issue before the Court was not whether or not appellant was entitled to an "evidentiary hearing." The issue instead was whether an indigent defendant's complaint that he is dissatisfied with appointed counsel may be rejected without any inquiry at all.

Certainly instituting a rule that trial judges may not dismiss such complaints summarily without any inquiry at all is not synonymous with requiring an "evidentiary hearing." Further, such a rule would not lead to the "disruption of any reasonable calendar system."

As the Court acknowledged (op., p. 1), appellant's complaint that he had no confidence in his appointed counsel stated no ground or reason at all, and accordingly, the trial court had no basis upon which to make a judgment that it had or lacked merit. Under the circumstances, it would have been a simple matter and would not have disrupted the calendar to summon the defendant and his counsel into court and inquire into the matter. If, upon such inquiry, the complaint appeared frivolous, then it could be disposed of summarily. If, on the other hand, inquiry revealed that the complaint had substance, then the only course consistent with justice would have been to set the matter down for further exploration even if such action did "disrupt" the calendar. But to hold, as the Court does here, that complaints of this nature may simply be ignored does not comport with the obligation of courts to protect the interests of indigent defendants.

To imply, as the opinion does, that an indigent defendant, in jail, and without aid of counsel (necessarily so, since his complaint is against his assigned counsel) has the burden, in the first instance, of setting out a meritorious complaint in writing is unrealistic. Moreover, it is in conflict with the concurring opinion of Judge

(now Chief Justice) Burger in Brown v. United States, 105 U.S. App. D.C. 77, 264 F. 2d 363 (1959). There, Judge Burger said that, if the reasons for objection to counsel are not made known, "the court then has a duty to inquire." (emphasis supplied, App. D.C. at 83, F. 2d at 369). Here, the panel that decided this case held that the court has no duty to inquire. The contradiction between the current opinion and Judge Burger's concurring opinion in Brown suggests the need for an en banc court to resolve this conflict.

Respectfully submitted,

David Rein
430 National Press Building
Washington, D. C. 20004
Attorney for Appellant
(Appointed by the Court)